A

VIRAN NAGAPAN v. DEEPA SUBRAMANIAM; PEGUAM NEGARA MALAYSIA & ANOR (INTERVENER)

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
TENGKU MAIMUN TUAN MAT JCA
B AHMADI ASNAWI JCA
[CIVIL APPEAL NO: N-02-1004-06-2014]
30 DECEMBER 2014

C ***CONSTITUTIONAL LAW:*** *Courts – Jurisdiction – Conflict of jurisdiction between civil and Syariah Court – Petition for dissolution of marriage and order for custody of children – Syariah Court dissolved marriage and granted order for custody of children – Whether Syariah Court has jurisdiction to hear and determine matters arising from marriage registered and solemnised under Law Reform (Marriage and Divorce) Act 1976 – Whether civil court has jurisdiction when one party in marriage*
D *converted to Islam – Whether High Court has power to set aside Syariah Court orders – Federal Constitution, art. 121(1A)*

FAMILY LAW: *Divorce – Jurisdiction of court to hear petition – Dissolution of marriage and custody of children – Parties married under Law Reform (Marriage and Divorce) Act 1976 – Husband converted to Islam and applied for dissolution of*
E *marriage and custody of children at Syariah Court – Syariah Court dissolved marriage and granted custody to husband – Whether orders granted by Syariah Court valid – Whether civil court could set aside orders of Syariah Court*

FAMILY LAW: *Custody – Jurisdiction – Husband converted to Islam and applied for dissolution of marriage and custody of children at Syariah Court – Syariah Court*
F *dissolved marriage and granted custody to husband – Whether civil court has jurisdiction when one party in marriage converted to Islam – Whether High Court has power to set aside Syariah Court order – Whether husband met threshold under s. 53, Child Act 2001*

G ***ISLAMIC LAW:*** *Jurisdiction – Syariah Court – Parties married under Law Reform (Marriage and Divorce) Act 1976 – Husband converted to Islam and applied for dissolution of marriage and custody of children to Syariah Court – Whether Syariah Court has jurisdiction to hear and determine matters relating to non-Muslim marriages*

H The appellant husband ('the appellant') and the respondent wife ('the respondent') were married in 2003 under the Law Reform (Marriage and Divorce) Act 1976 and had two children. When the appellant converted to Islam in 2012, he registered his conversion and of the two children and proceeded to apply for the dissolution of his marriage with the respondent
I at the Syariah High Court ('the Syariah Court'). The Syariah Court granted custody order to the appellant while the respondent was granted visitation rights and access to the children. In turn, the respondent petitioned for a divorce and sought custody of the two children at the civil High Court ('the

High Court'). The High Court allowed the petition and granted custody of the two children to the respondent, resulting in the children being immediately surrendered to the respondent. Two days later, the appellant took one of the children away from the respondent. This prompted the respondent to file an application in the High Court for a recovery order under s. 53 of the Child Act 2001 ('the Act'), which was granted. Hence, the present appeal. The issues that arose for the court's determination were (i) whether the High Court had jurisdiction to hear the application under s. 53 of the Act because ss. 2 and 11 of the same required the presence of a Magistrate and two advisers; (ii) whether the High Court had the power to disregard or indirectly set aside the Syariah Court order for custody; and (iii) whether the respondent had met the threshold under s. 53 of the Act.

Held (dismissing appeal; affirming decision of High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) There was no ambiguity in the definition of the word 'court'. It is either the 'court for children' as constituted under s. 11 of the Act or it can be 'any other court'. Any other court is not a court for children. To construe the words 'any other court' as to mean 'a court for children' would render the words 'any other court, as the case may require' redundant. The plain meaning of 'any other court, as the case may require' included the High Court. The parties were already before the High Court for the dissolution of marriage and for custody. Consequent to the custody order by the High Court, the High Court can and should deal with the application for recovery of the child under s. 53 of the Act. Further, under s. 24(d) of the Courts of Judicature Act 1964, the High Court is clearly seized with the jurisdiction 'over the person and property of infants'. (para 14)

(2) The decision of the Federal Court in *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* ('*Subashini*'s case') was clear. So long as he contracted a civil marriage and the children were born out of a civil marriage, the Syariah Court has no jurisdiction. It did not matter that the appellant had converted and that he had a custody order from the Syariah Court. It is the respondent who has lawful custody of the children because the High Court, which has the jurisdiction, had decided in favour of the respondent. (para 18)

(3) The High Court judge did not err in deciding that the respondent was the person having custody of the children pursuant to ss. 52(2) and 53(2) of the Act by reason that the Syariah Court had no jurisdiction to grant custody of the children of a civil marriage. Although s. 52(2) of the Act provides that a person has lawful custody of a child if he has been conferred custody of the child by a Syariah Court, in the light of the decision in the case of *Subashini*, that provision must be read in the proper context, namely that the Syariah Court order must necessarily

A relate to the custody order granted over children of a Muslim marriage. None of the defences provided under s. 52(3)(b) of the Act were applicable to the current case. The existence of the Syariah Court order did not provide any defence to the appellant. (paras 23 & 25)

Bahasa Malaysia *Translation Of Headnotes*

B

Perayu suami ('perayu') dan responden isteri ('responden') telah berkahwin pada tahun 2003 di bawah Akta Membaharui Undang-undang (Perkahwinan dan Penceraian) 1976 dan telah memperolehi dua orang anak. Apabila perayu memeluk agama Islam pada tahun 2012, dia telah mendaftarkan penukaran agamanya dan kedua-dua orang anaknya dan seterusnya memohon
C pembubaran perkahwinannya dengan responden di Mahkamah Tinggi Syariah ('Mahkamah Syariah'). Mahkamah Syariah memberikan perintah jagaan kepada perayu manakala responden diberikan hak melawat dan akses kepada anak-anak tersebut. Seterusnya, responden mempetisyenkan bagi penceraian dan memohon jagaan kedua-dua orang anak tersebut di
D Mahkamah Tinggi sivil ('Mahkamah Tinggi'). Mahkamah Tinggi membenarkan petisyen dan memberikan jagaan kedua-dua orang anak tersebut kepada responden, mengakibatkan anak-anak tersebut serta-merta diserahkan kepada responden. Dua hari kemudian, perayu mengambil salah seorang daripada anak-anak tersebut daripada responden. Ini menyebabkan
E responden memfailkan permohonan di Mahkamah Tinggi bagi perintah mendapatkan balik di bawah s. 53 Akta Kanak-kanak 2001 ('Akta'), yang mana dibenarkan. Oleh itu, rayuan ini. Isu-isu yang berbangkit bagi pemutusan mahkamah adalah (i) sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk membicarakan permohonan di bawah s. 53 Akta kerana
F ss. 2 dan 11 Akta yang sama mengkehendaki kehadiran seorang majistret dan dua orang penasihat; (ii) sama ada Mahkamah Tinggi mempunyai kuasa untuk menolak atau mengenepikan perintah Mahkamah Syariah bagi jagaan; dan (iii) sama ada responden telah memenuhi keperluan di bawah s. 53 Akta.

Diputuskan (menolak rayuan dan mengesahkan keputusan Mahkamah
G **Tinggi)**

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Tiada kesamaran dalam definisi perkataan 'mahkamah'. Ia adalah sama ada 'mahkamah bagi kanak-kanak' seperti yang dinyatakan dalam s. 11
H Akta atau ia boleh jadi 'mana-mana mahkamah lain'. Mana-mana mahkamah lain bukanlah mahkamah bagi kanak-kanak. Untuk mentafsir perkataan-perkataan 'mana-mana mahkamah lain' agar bermaksud 'mahkamah bagi kanak-kanak' akan menjadikan perkataan-perkataan 'mana-mana mahkamah lain, mengikut kehendak keadaan' tidak
I diperlukan. Maksud nyata 'mana-mana mahkamah lain, mengikut kehendak keadaan' termasuklah Mahkamah Tinggi. Pihak-pihak telah pun ke Mahkamah Tinggi bagi pembubaran perkahwinan dan jagaan. Berikutan perintah jagaan oleh Mahkamah Tinggi, Mahkamah Tinggi

boleh dan sepatutnya membicarakan permohonan bagi mendapatkan balik anak tersebut di bawah s. 53 Akta. Selanjutnya, di bawah s. 24(d) Akta Mahkamah Kehakiman 1964, Mahkamah Tinggi mempunyai bidang kuasa 'ke atas diri dan harta budak'.

(2) Keputusan Mahkamah Persekutuan dalam *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* ('kes *Subashini*') adalah jelas. Selagi dia berkontrak di bawah perkahwinan sivil dan anak-anak dilahirkan hasil daripada perkahwinan sivil, Mahkamah Syariah tidak mempunyai bidang kuasa. Adalah tidak penting bahawa perayu telah menukar agamanya dan bahawa dia telah memperolehi perintah jagaan daripada Mahkamah Syariah. Responden yang mempunyai jagaan sah anak-anak tersebut kerana Mahkamah Tinggi, yang mempunyai bidang kuasa, telah memutuskan berpihak kepada responden.

(3) Hakim Mahkamah Tinggi tidak khilaf dalam memutuskan bahawa responden adalah pihak yang mempunyai jagaan ke atas anak-anak tersebut di bawah ss. 52(2) dan 53(2) Akta kerana Mahkamah Syariah tidak mempunyai bidang kuasa untuk membenarkan jagaan anak-anak perkahwinan sivil. Walaupun s. 52(2) Akta memperuntukkan bahawa pihak yang mempunyai jagaan sah seseorang anak sekiranya dia telah diberikan jagaan anak tersebut oleh Mahkamah Syariah, berdasarkan keputusan dalam kes *Subashini*, peruntukan tersebut mestilah dibaca dalam konteks yang betul, khasnya bahawa perintah Mahkamah Syariah mestilah berkaitan dengan perintah jagaan yang diberikan ke atas anak-anak di bawah perkahwinan Muslim. Tiada pembelaan yang diperuntukkan di bawah s. 52(3)(b) Akta yang terpakai dalam kes ini. Kewujudan perintah Mahkamah Syariah tidak memperuntukkan sebarang pembelaan buat perayu.

Case(s) referred to:

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(foll)***

Legislation referred to:

Child Act 2001, ss. 2, 11, 17(2), 52(2), (3)(b), 53(2)
Courts of Judicature Act 1964, s. 24(d)
Federal Constitution, art. 121(1A)

For the appellant - Haniff Khatri (Muhammad Faiz Fadzil, Kamarul Arifin Wafa & Mohd Irzan Iswatt Mohd Noor with him); M/s Kamarul Arifin Wafa & Assocs
For the intervener - Suzana Atan (Shamsul Bolhassan with her); SFC
For the respondent - Aston Paiva (Joanne Leong with him); M/s YH Teh & Quek
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Women's Aid Organisation (WAO)
Association Of Women Lawyers (AWL)
All Women's Action Society (AWAM)
Perak Women For Women Society

A *Persatuan Kesedaran Komuniti Selangor (EMPOWER)*
Persatuan Sahabat Wanita Selangor
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Sisters In Islam (SIS)
Tenaganita
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B *Philip Koh Tong Ngee (MCCBCHST)*

[Appeal from High Court, Seremban; Divorce Petition No: 33-57-12-2013]

Reported by Najib Tamby

C **JUDGMENT**

Tengku Maimun Tuan Mat JCA:

[1] This is an appeal by the appellant husband against the order of the High Court at Seremban in granting a recovery order to the respondent wife.

D **Background Facts**

[2] The appellant and the respondent were married in 2003 under the Law Reform (Marriage and Divorce) Act 1976 and they have two children, Shamila Viran and Mithran Viran.

E **[3]** In 2012, the appellant converted to Islam and he registered his conversion and of the two children at the Pusat Dakwah Islamiah, Seremban. Pursuant to his conversion, the appellant applied for the dissolution of the marriage at the Seremban Syariah High Court ('the Syariah Court'). In September 2013, the Syariah Court granted custody order to the appellant
F with visitation right and access to the respondent.

[4] In December 2013, the respondent filed a petition for divorce and sought for the custody of the two children at the Seremban High Court. The High Court granted the order for the dissolution of the marriage and granted custody of the two children to the respondent.

G **[5]** After the learned High Court Judge delivered the decision on 7 April 2014, the children were immediately surrendered to the respondent at the court premises. The respondent took the children home. Two days later, the appellant took away the youngest child, Mithran from the respondent.

H **[6]** Consequent to the custody order, the respondent filed an application in the High Court for a recovery order under s. 53 of the Child Act 2001 ('the Act'). The recovery order was granted by the High Court.

[7] The appellant filed separate appeals to the Court of Appeal against the decision of the High Court granting the custody order and the recovery order.

I **[8]** In the appeal against the custody order, which we had unanimously dismissed, the challenge by the appellant was primarily on the issue of jurisdiction, ie, whether the High Court or the Syariah Court has the

jurisdiction to grant the custody order. The basis of our judgment was the Federal Court decision in the case of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1 (which we are bound to follow) where the Federal Court had ruled that "... by contracting the civil marriage, the husband and wife were bound by the Law Reform Act in respect to divorce and custody of the children of the marriage, and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam."

[9] As mentioned above, this appeal concerns the recovery order, where the Honourable Attorney-General and the Inspector General of Police ('the IGP') had been added in as parties pursuant to an application to intervene.

The Appeal

[10] In challenging the recovery order, learned counsel for the appellant argued that:

(i) the High Court has no jurisdiction to hear the application under s. 53 of the Act;

(ii) the High Court has no power to disregard or indirectly set aside the Syariah Court order for custody, in contravention of art. 121(1A) of the Federal Constitution;

(iii) on the available affidavit evidence, the respondent has failed to meet the threshold required under s. 53 of the Act.

[11] For the interveners, learned Senior Federal Counsel ('SFC') submitted on the following issues:

(i) whether the recovery order was rightly issued by the High Court in the light of the existence of the custody order given by the Syariah Court; and

(ii) the jurisdiction of the High Court and the Syariah Court in respect of the custody orders and whether the High Court prevails over the Syariah Court.

Whether The High Court Had Jurisdiction To Hear The Application For Recovery Order Under s. 53 Of The Act

[12] Section 53 provides:

> (1) If it appears to the Court that there is reason to believe that a child had been taken or sent away without the consent of the person who has lawful custody of the child as described in section 52, the Court may make a recovery order.
>
> (2) A recovery order may be made by the Court on application being made by or on behalf of any person who has the lawful custody of the child.

[13] It was the argument of learned counsel for the appellant that the High Court has no jurisdiction to grant the recovery order. The basis for the argument is ss. 2 and 11 of the Act. Section 2 of the Act defines "Court" as "Court For Children or any other court, as the case may require"; and "Court For Children" means "The Court For Children constituted under s. 11". Under s. 11, the Court For Children consists of a Magistrate and two advisers. The word "any other court" in s. 2, submitted learned counsel, is to overcome the logistical problem, where there is no separate structure or building to house a Court For Children, but the existing structure or building may be utilised as Court For Children. Any other court, submitted learned counsel, must consist a Magistrate and two advisers.

[14] We are not persuaded by the argument of learned counsel. There is no ambiguity in the definition of the word "court". It is either the "Court For Children" as constituted under s. 11 or it can be "any other court". Any other court is not a Court For Children. To construe the words "any other court" as to mean a "Court For Children" would render the words "any other court, as the case may require", redundant. And giving the words "any other court, as the case may require" the plain meaning, it includes the High Court where the parties were already before the High Court for the dissolution of marriage and for custody. It stands to reason that consequent to the custody order made by the High Court, the High Court can and should deal with the application for recovery of the child under s. 53 of the Act. Further, under s. 24(d) of the Courts of Judicature Act 1964, the High Court is clearly seised with the jurisdiction "over the person and property of infants". We therefore find no merits in the first issue raised by the appellant.

Whether The High Court Has The Power To Disregard Or Indirectly Set Aside The Syariah Court Order For Custody

[15] Learned counsel submitted that in hearing an application for a recovery order, the court must first determine whether the applicant has a lawful custody of the child and secondly whether the person alleged to have taken away the child has any available defences to the said application.

[16] Learned counsel further submitted that whilst the respondent relied on the custody order granted by the High Court, the appellant is claiming lawful custody of the child pursuant to the Syariah Court order. We will take this point together with the issue raised by learned SFC, namely whether the recovery order was rightly issued by the High Court in the light of the existence of the custody order given by the Syariah Court.

[17] We accept that the custody order granted by the High Court came after the appellant had converted to Islam and after he had obtained custody order from the Syariah Court. And it cannot be denied that the Syariah Court has jurisdiction over the appellant as he now professes the religion of Islam. As provided by art. 121(1A) of the Federal Constitution, the Syariah Court and the Civil High Court are courts of co-ordinate jurisdiction. One court is in no position to over rule or set aside the decision of another court.

[18] In our judgment though, the issue is not whether the High Court can disregard or set aside the Syariah Court order. The issue before us concerns which court has jurisdiction over parties who had contracted civil marriage and over children begotten out of civil marriage. And this issue has been settled by the Federal Court in *Subashini (supra)* where the Federal Court held that the High Court has the exclusive jurisdiction in matters relating to divorce and custody of children of a civil marriage. It does not matter that the appellant has converted and that he has a custody order from the Syariah Court. The decision of the Federal Court is clear. So long as he contracted a civil marriage and the children are born out of civil marriage, the Syariah Court has no jurisdiction. The issue raised by learned SFC as to whether the High Court prevails over the Syariah Court does not arise. The High Court which has the jurisdiction had decided in favour of the respondent. It is the respondent who has the lawful custody of the child. The second issue raised by the appellant cannot therefore be sustained.

Whether The Respondent Has Met The Threshold Under s. 53 Of The Act

[19] Learned counsel submitted that the respondent has failed to meet the threshold required under s. 53 of the Act. In support of the submission, learned counsel relied on s. 52 of the Act which provides:

> (2) A person has lawful custody of a child under this section if he has been conferred custody of the child by virtue of any written law or by an order of a Court, including a Syariah Court.
>
> (3) It shall be a defence under this section if a parent or guardian takes or sends a child away without the consent of the person having the lawful custody of the child if:
>
> (a) the parent or guardian:
>
> (i) does it in the belief that the other person consented, or would have consented, if he was aware of all the relevant circumstances; or
>
> (ii) has taken all reasonable steps to communicate with the other person but has been unable to communicate with him;
>
> (b) the parent or guardian has reasonable grounds to believe that the child is being abused, neglected, abandoned, or exposed in manner likely to cause the child physically or emotional injury; or
>
> (c) the other person has unreasonably refused to consent although he was aware of all the relevant circumstances.

[20] On this issue, the submission of learned counsel is two-fold. First, it was contended that the appellant is also a person having lawful custody pursuant to s. 52(2) which recognises custody order of the Syariah Court and second, the appellant was justified in taking away the child from the respondent to save the child's faith and this provides the appellant a defence under para. (b) of s. 52(3) of the Act.

[21] In granting the recovery order, the learned High Court Judge had considered the following questions:

i) Whether the Petitioner/Wife has lawful custody of the child thus entitling her to make the present application pursuant to section 53(2) of the Child Act 2001.

ii) Whether the Respondent/Husband has a valid defence when he took the child away from the Petitioner/Wife, reason being that he was trying to "save the faith" of the child.

[22] On the first question, by reason that the Syariah Court has no jurisdiction to grant custody of the children of a civil marriage, the learned High Court Judge found that the respondent is the person having custody of the child pursuant to ss. 52(2) and 53(2) of the Act.

[23] We find that the learned High Court Judge has not erred in so deciding. Although s. 52(2) of the Act provides that a person has lawful custody of a child if he has been conferred custody of the child by a Syariah Court, in the light of the decision in *Subashini (supra)*, that provision must be read in the proper context, namely that the Syariah Court order must necessarily relate to the custody order granted over children of a Muslim marriage.

[24] On the second question, the learned judge made the following findings:

> The religion *(sic)* upbringing of the child was never a term imposed by this Court, when granting the Order for the *decree nisi* and the custodial rights to the Petitioner/Wife. It was never a term in the Order that the child is to be sent to religious classes. The matters that were stated in the affidavit of the respondent "Afidavit Penjelasan Tingkah Laku pengambilan Anak Pada 9.4.2014" dated 11.4.2014, are things or matters that happened outside the court which was not within the court orders dated 7.4.2014. Hence there is no change shown in circumstances in the facts of the case from the time when the order dated 7.4.2014 was granted until now.
>
> The Respondent/Husband stated that he will only return the child if the *decree nisi* is varied. The court does not grant Orders when it is put at ransom nor does it act upon threats by anyone. If the *decree nisi* needs to be varied due to change in circumstances, a proper formal application must be filed with affidavit in support. As far as this case is concerned, there was no proper application with affidavit in support filed by the Respondent/Husband for the Order of the *decree nisi* to be varied.

[25] The learned judge proceeded to examine the defence under s. 52(3)(b) of the Act and Her Ladyship concluded that none of the defences provided therein were applicable to the current case. We agree with the learned judge. Again, applying the decision in *Subashini (supra)*, the existence of the Syariah Court order does not provide any defence to the appellant.

[26] As for the appellant's averment that he was trying to save the faith of the child, the learned judge states:

> Even if the Respondent/Husband is to apply para (b), in stating that the child was not being sent to religious classes, that, by itself does not amount to proof that "the child is being abused, neglected, abandoned, or exposed in manner likely to cause the child physically or emotional injury".

[27] We agree with the learned judge. Section 17(2) of the Act explains the physical and emotional injury to a child as follows:

> (a) physically injured if there is substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by amongst other things, a laceration, a contusion, an abrasion, a scar, a fracture or other bone injury, a dislocation, a sprain, haemorrhaging, the rupture of a viscus, a burn, a scald, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth;
>
> (b) emotionally injured if there is substantial and observable impairment of the child's mental or emotional functioning that is evidenced by amongst other things, a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development.

[28] In any event, as observed by the learned High Court Judge, the appellant could avail himself of an application to vary the custody order should there be a change in the circumstance, which the appellant had failed to do.

[29] In the final analysis, we find no appealable error on the part of the learned judge as to warrant appellate intervention. The learned judge had correctly appreciated the law and the facts. There is no reason for us to disturb the recovery order made by the learned judge which was consequent upon the custody order, which we had earlier on, upheld.

[30] For completeness, we find that the recovery order is not flawed despite the Government of Malaysia and the Polis Diraja Malaysia not being made parties to the proceedings in the High Court before the grant of the said order.

[31] We unanimously dismiss the appeal and we affirm the decision of the High Court.